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BRIEF OF PETITIONER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 262. [redacted] 9

THOMAS P. ALDER, PETITIONER,

vs.

WILLIAM EDENBORN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THERON G. STRONG,
Of Counsel for Petitioner,
49 Wall Street,
New York City.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States.

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE.

The writ was granted to review a judgment of the United States Circuit Court of Appeals for the Second Circuit reversing a judgment of the United States District Court for the Eastern District of New York, in favor of the plaintiff entered upon the report of a Referee, appointed pursuant to a written stipulation waiving a jury trial (pp. 75–7, fols. 223–131).

For a statement of the essential facts of the case, the petitioner respectfully refers the Court to the statement of the case contained in the brief in the case of *Sim* vs. *Edenborn* submitted herewith.

Assignment of Errors and Specification of Errors Relied On.

1. The Circuit Court of Appeals erred in reversing the judgment herein, inasmuch as proper deference and respect for the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn* (203 N. Y., 210), should have led the Circuit Court of Appeals to lean toward following the said decision of the New York Court of Appeals.

2. The Circuit Court of Appeals having held that no conclusion can be reached with confidence, erred in reversing the judgment herein, and in refusing to follow said decision of the New York Court of Appeals, accepting that of the Appellate Division of the Supreme Court in *Hecksher* vs. *Edenborn* (131 App. Div., 253), especially for the reasons expressed by Justice Miller at page 266, notwithstanding that said decision of said Appellate Division had been reversed by the Court of Appeals and said opinion was a minority opinion overruled by the New York Court of Appeals.

3. The Circuit Court of Appeals erred in reversing the judgment upon the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as it appears upon the facts stated in the complaint and found by the Referee that if defendant was not put *in statu quo*, his own wrongful acts had so complicated the transaction complained of as to prevent plaintiff and his assignors from doing so.

4. The Circuit Court of Appeals having decided that the findings of the Referee were binding upon it, and support the judgment rendered, erred in reversing the said judgment holding that the complaint failed to state a cause of action because a consideration of the syndicate agreement satisfied it that the defendant could not be restored to his original position.

5. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as on the facts stated in the complaint plaintiffs and their assignore did, as far as possible, place him *in statu quo* by tendering to him all that they had received from him.

6. The Circuit Court of Appeals erred in reversing the judgment on the ground that the complaint failed to show that the defendant was put *in statu quo* inasmuch as there was no assignment of error by the defendant (plaintiff in error below), specifying as a ground of error that the defendant was not put *in statu quo*, and the point was not raised at the trial.

7. That the assignments of error set forth in the record on page 781 to 850, inclusive, are a perversion of the rule relating thereto, and insufficient to raise for review the alleged errors upon which the Circuit Court of Appeals reversed the judgment herein.

8. The Court erred in reversing the judgment herein on the ground that "because of the peculiar situation of any particular case no right of rescission exists in favor of one who has been led by fraud into a complicated agreement which has been fully executed", and "that this is such a case", inasmuch as fraud will, if it is acted upon promptly when discovered, be a ground for rescinding an executed contract.

9. The Court erred in reversing the judgment on the ground that "if the syndicate subscribers have any right of rescission, that right must be worked out through the purchasing company," inasmuch as the wrong and injury complained of was done to syndicate subscribers individually and personally, and was not a wrong and injury to corporate property, which must be redressed through the company.

BRIEF OF THE ARGUMENT.

FIRST: ALDER'S CASE DIFFERS ONLY IN UNIMPORTANT DETAILS FROM THAT OF SIM AND HIS ASSIGNORS, AND PRESENTS THE SAME QUESTIONS.

I.—The Circuit Court of Appeals held that the Referee's findings support the judgment (p. 178).

II.—The referee in his report (p. 58, fol. 172) finds in accordance with the allegations of the complaint as follows:

(1) Edenborn's ownership and control of the United States Iron Company (p. 20, fol. 59; p. 59, fol. 175).

(2) His preparation of the syndicate agreement (p. 18, fol. 53; p. 50, fol. 170).

(3) His conversation with Alder about his subscription is detailed in his report (pp. 59, 60, fols. 177-8), and as requested by petitioner (p. 95, fol. 285) as follows:

> 7. "Thereafter and on or about June 1, "1902, the defendant requested plaintiff to "subscribe to said Syndicate agreement, "and represented and stated to the plaintiff "that it was proposed under said Syndicate "to purchase only valuable and paying "properties; that each subscription was "payable in dollars and not in property; "that he had made a subscription for $500,- "000 payable in dollars and not in property; "that the enterprise was being organized in "good faith; that each of the subscribers "according to their interest had equal "rights and stood on the same basis; that "every man's dollar, was put up against "every other man's dollar, and that there "were to be no special advantages to any

"one; and such representations and state-
"ments were made to the said plaintiff to
"induce him to become a subscriber to
"said Syndicate."

III.—The Referee finds that Alder did not at once subscribe, but that after subscription for all the stock had been made, he requested Edenborn to procure him some of the subscribed stock, which the defendant undertook to do. The Referee details in his finding Number 8 (fols. 286–7), as requested by plaintiff, what had taken place in the meantime between the parties on various occasions as follows (p. 96, fol. 286):

8. "That the defendant on various occa-
"sions between said April 15th, 1902, and
"December 6th, 1902, repeated and reiterated
"said statements and each of them to the
"plaintiff, and in addition thereto repre-
"sented and stated, that plaintiff by not sub-
"scribing thereto would miss the opportunity
"of a lifetime; that the said properties were
"earning dividends before anything was
"completed, and the said stock was earning
"so much that the plaintiff could put the
"stock away and forget that he had paid for
"it, and that $136.08 was due for interest on
"account of deferred payment of said sub-
"scription to said Syndicate agreement, and
"thereupon plaintiff consented to become
"and became and was accepted by defendant
"as a subscriber thereto."

IV.—The Referee also finds that Edenborn subsequently procured from Elwood a Syndicate subscriber, a part of his subscription, and thereafter procured the stock and delivered 100 shares thereof to Alder, for which the latter paid the subscription price of $10,000, to which was added the sum of $136.08 for interest to place Alder upon the same footing, as to cost, with those who actually subscribed the Syndicate agreement (fol. 178), and that

Edenborn knew, and it was then arranged, that Alder was to get the stock upon the same terms and conditions as he would have received the same had he subscribed to the Syndicate agreement (p. 69, fol. 179).

V.—The Referee then finds as follows:

> "FIFTH: At the time of the conversation "between the plaintiff and the defendant, "leading up to the procurement and delivery "of the stock to the plaintiff, the defendant "knew and it was then arranged that the "plaintiff was to get such stock upon the "same terms and conditions as he would have "received the same had he subscribed to the "said Syndicate agreement (p. 60, fol. 179).
>
> "SIXTH: The defendent understood when "he obtaiaed the right to deliver the stock "from Elwood's subscription to capital stock "that the same would be delivered to the "plaintiff upon the same terms and condi- "tions as though the plaintiff had made an "original subscription to the Syndicate agree- "ment for the same shares of stock" (p. 60 fol. 179).

VI.—The allegation of defendants' duty to disclose to the plaintiff (p. 109, fol. 14) is not denied and is found by the Referee (p. 61, fol. 181; p. 109, fol. 327) as well as the failure to disclose (fol. 180), and that such failure to make disclosure operated in law as a fraud upon the plaintiff (p. 60, fol. 185) which entitled the plaintiff to rescind and recover from Edenborn the amount paid by him.

VII.—The Referee makes the same findings as in the Sim case respecting Edenborn's, Elwood's and the Williams Estate's subscriptions and that they at no time intended to pay the same except by stock of the United States Iron Company and whatever cash was needed in addition to make the ful

amounts of said subscriptions, which they did (pp. 98-9, fols. 294, 296) and of which Edenborn kept Alder in ignorance (pp. 99-100, fols. 297-9).

VIII.—When Edenborn used his powers of persuasion to induce Alder to become a subscriber to the Syndicate and Alder in reliance on his statements requested him to procure $10,000 of the subscription and Edenborn undertook so to do upon the same terms as other subscribers, he undertook to act as Alder's agent and acted as such in procuring it, and when Edenborn being a Syndicate manager accepted Alder as a subscriber to the Syndicate agreement he undertook to act and acted as Alder's agent and attorney under the Syndicate agreement. He thus occupied a double relation of trust and confidence, which required from him the utmost good faith, and full and complete disclosure of all facts which would affect Alder's interest in the transaction.

IX.—The Referee not only finds that Alder consented to become and became and was accepted by Edenborn as a subscriber to the Syndicate (p. 96, fol. 287), but the answer alleges this fact in substance (p. 31, fol. 93), and Alder's name is on the list of subscribers annexed to the answer, showing that Edenborn treated him as one of the subscribers (p. 54, fol. 162).

X.—The transaction amounnted to nothing more or less than an agent inducing his principal to become one of a number of individuals to purchase the agent's property, the agent concealing his ownership from the principal.

XI.—All of the cases referred to in the brief in *Sim* v. *Edenborn* apply with equal force to the case of Alder, especially those in which it is held that where one occupying a fiduciary relation possesses

a personal interest in a transaction, with knowledge of material facts, and induces his principal to enter into the transaction without making full and complete disclosure, is liable as for fraud in law, irrespective of whether there was any motive to deceive or any intent to conceal.

XII.—There was in fact no claim nor any request to find that Alder knew any of the facts relating to Edenborn's ownership and control of the United States Iron Company, or that there was no intention on the part of Edenborn, Elwood and the Williams estate to pay their subscriptions in dollars, but largely in stock of the United States Iron Company.

SECOND: THE PETITIONER SUBMITS TO THE COURT HEREWITH HIS BRIEF OF THE ARGUMENT IN THE CASE OF *Sim* VS. *Edenborn*, THE QUESTIONS DISCUSSED THEREIN BEING INVOLVED IN AND CONTROLLING THIS CASE.

THIRD: THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT OF THE DISTRICT COURT ENTERED UPON THE REPORT OF THE REFEREE SHOULD BE AFFIRMED.

THERON G. STRONG,
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49 Wall Street,
New York, N. Y.

(7290P)

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